support of his case a copy of a deed of gift The deed was lost, but it was admitted that it was insufficiently stamped The judges of the High Court (Madras) held that the copy should not be admitted even on payment of a penalty as "the Stamp Act of 1879 prescribes that such payment shall be indorsed on the document and presupposes that the document is forthcoming." On appeal to the Privy Council Lord Watson said: —

"... The only question arising for decision in this appeal is — Whether the courts below were right in holding that the provisions made by the Act of 1879 for the case of deeds either unstamped or insufficiently stamped, have no application when the original deed, which ought to have been stamped or was insufficiently stamped, has not been produced? That is a question which must depend upon the terms of the statute itself.

Their Lordships are satisfied, by an examination of its clauses, that the construction of the Act of 1879 adopted by the court below is correct. These clauses throughout deal with and exclusively refer to the admission as evidence of the original documents which at the time of their execution, were not stamped at all or were insufficiently stamped. It is only upon production of the original writ that the collector has the power given him, or the duty imposed upon him, of assessing and charging the penalty, a duty which he must in that case perform by writing an endorsement upon the writ submitted to him, which then, and not till then, becomes probative in law..."

His Lordship then referred to section 33 of the Act, which with some variations that are not material is the same as section 51 of our Stamp Ordinance. There was also a reference to the relevant portion of section 34 of the Act, which is identical with section 52 of our Stamp Ordinance. His Lordship added that the effect of granting the remedy which the appellant maintained he was entitled to would be to add to the Act a provision which it did not contain.

This decision was followed by the Supreme Court of India. (See *State of Bihar* v. *Karam Chand Thapar & Bros. Ltd.*[4]). In the light of the above authorities I hold that Exhibit P.4 was wrongly admitted.

It is true that the collector had certified that no duty was chargeable but this is immaterial as the instrument indorsed was not the original. (See *Murugayya Pillai* v. *Rajagopal Pillai & Ors.*[5]). With the elimination of Exhibit P.4, there is hardly any evidence pointing to the participation of the first and second respondents as partners in the business of the firm (Y.N.T. Company).

The first respondent's involvement in the affairs of the partnership was no more than that of a guarantor of the firm's overdraft with the bank and that of an exporter through his company Kwong Fui Loong Ltd., of the firm's timber. There is evidence that he had increased his guarantee of the overdraft from $50,000 to $320,000, but that was because of the increased commission given him in respect of the export business.

As regards the case against third and fourth respondents, the learned trial judge said that he could rely neither on the evidence of the appellants nor on that of the two respondents. The onus being on the appellants, he therefore held they had failed to discharge it. The learned trial judge had the advantage denied to this court of seeing and hearing the witnesses, and his findings cannot be lightly disturbed. In the unsatisfactory state of the evidence in this case, I cannot see what other conclusion he could have come to.

I observe that in paragraph 11 of their statement of claim the appellants allege that it was the first respondent who had been managing the business at all material times. This paragraph was never amended.

I find no merit in the other grounds of appeal.

The appeal is dismissed with costs.

**Azmi L.P.:** I agree that the appeal be dismissed with costs and the deposit of $500 will be paid to the respondents towards their taxed costs.

**Yong J.:** I have had the advantage of reading the judgment of the learned Chief Justice of Borneo and agree to the order proposed by him for reasons as stated therein. I have nothing to add.

*Appeal dismissed.*

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## LO SU TSOON TIMBER DEPOT v. SOUTHERN ESTATE SDN. BHD.

**[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Yong J.) June 11, 1971]**

**[Kota Kinabalu — Federal Court Civil Appeal No. 93 of 1970]**

*Contract — Illegality — Agreement assigning rights in a licence for timber extraction — Beach of express condition in licence granted under Forest Rules, 1954, r. 4(1) — Forest Enactment, 1968, ss. 23(a) and 24(1), (6) — Breach of — Effect of.*

*Practice and Procedure — Whether appellate court can take cognizance of point of illegality raised for the first time on appeal — Observations on.*

*Forests — Licence — "Personal to holder and shall not be transferable in any manner whatsoever" — Meaning of.*

This was an appeal against the judgment of the High Court at Kota Kinabalu whereby the respondents obtained judgment against the appellants in the sum of $255,000. The Forest Officer, Sabah had issued a licence for the extraction of timber to the Beaufort Timber Extraction Co-operative Society. This society appointed Jesselton Development Ltd. as their attorney and the Jesselton Development Ltd. in turn appointed the respondents in their place as attorneys for the licensees. The appellants subsequently entered into an agreement with the respondents, whereby the respondents in effect transferred their rights in the licence to the appellants. In their grounds of appeal, the appellants, *inter alia*, raised for the first time a point of illegality; that the agreement was an assignment of the rights of the licensees under the licence in contravention of an express condition in the licence and was therefore illegal.

**Held:** allowing the appeal: (1) the agreement in this case was clearly in breach of the provisions of sections 23 and 24 of the Forest Enactment and therefore illegal and any claim based thereon cannot be enforced;

(2) the power of attorney given to the appellants was a colourable device to deceive others into believing that the appellants were operating as agents for the licensees.

*Cases referred to:-*

(1) *Snell* v. *Unity Finance Limited* [1963] 3 All E.R. 50 at p. 55.

(2) *Edler* v. *Auerbach* [1949] 2 All E.R. 692.

(3) *North-Western Salt Company Limited* v. *Electrolytic Alkali Company Limited* [1914-15] All E.R. Rep. 752.

(4) *Allah Rskhi & Ors.* v. *Shah Mohamed* A.I.R. 1934 P.C. 77.

(5) *Chai San Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152 at p. 153, P.C.

(6) *Tan Bing Hock* v. *Abu Samah* [1967] 2 M.L.J. 148.

(7) *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221.

(8) *Leong Poh Chin* v. *Chin Thin Sin* [1959] M.L.J. 246.

(9) *Kearney* v. *Whitehaven Colliery Company* [1893] 1 Q.B. 700 at p. 713.

FEDERAL COURT.

*W. K. Loo* for the appellants.

*Shelley Yap Yeok Siew* for the respondents

*Cur. Adv. Vult.*

**Ismail Khan C.J. (Borneo):** This is an appeal from the judgment of the High Court at Kota Kinabalu, whereby the respondents obtained judgment against the appellants in the sum of $255,000. The learned trial judge dismissed the appellants' counterclaim for $83,128.08. The circumstances leading to the action in the High Court are as follows. The Forest Officer, Sabah, issued a licence under the Forest Rules, 1954 on the 14th day of September, 1965 authorising the Beaufort Timber Extraction Co-operative Society (hereinafter called the licensees) to extract timber at Lumadan in area about 3,370 acres (hereinafter called the concession).

By a power of attorney dated the 3rd day of August, 1965, (hereinafter called the first deed) the licensees appointed the Jesselton Development Limited their attorneys in respect of the rights under the licence. There is power to substitute under the deed.

By a deed dated the 13th of September, 1966 (hereinafter referred to as the second deed) the Jesselton Development Limited appointed the respondents in their place as attorneys for the licensees. The respondents exercised their rights under the licence until the year 1968 when they failed to pay royalty and other dues to the Forest Department. As a result their logs in the log-pond at Weston and the logs in the jungle camp at Beaufort were seized by the department.

On the 12th of December 1968, the appellants entered into an agreement with the respondents. For a better appreciation of issues the agreement (hereinafter called the agreement) is set out in full herein:

"*AN AGREEMENT* made *BETWEEN SOUTHERN ESTATE SDN. BHD.* of Kota Kinabalu of the one part *AND LO SU TSOON TIMBER DEPOT* of Kota Kinabalu of the other part: Both parties agree that as from 12th day of December 1968 Lo Su Tsoon Timber Depot is authorised and be responsible for managing all the business of Southern Estate Sdn. Bhd. inside the Beaufort Timber Co-operative Society under Timber Licence FOB. 4/65. Lo Su Tsoon shall have the right to the extraction of timber, payment of royalty, export and sale etc. As to taxes, labourers' wages and all expenses for management and maintenance etc., these shall be borne by Lo Su Tsoon Timber Depot. Medical expenses in the timber camp and insurance etc., are also included.

2. Lo Su Tsoon Timber Depot agrees that as from the date of taking over, in respect of the area of 2,500 acres from which timber has not been felled under this Licence, the Beaufort Timber Co-operative Society shall be paid $175 for each acre and also the Jesselton Development Co. Sdn. Bhd. shall be paid $75 (per acre). Each year Lo Su Tsoon Timber Depot shall be responsible to pay on behalf of Southern Estate Sdn Bhd. all such sums payable, namely to pay M$625,000 to the abovenamed persons until full payment.

3. Lo Su Tsoon Timber Depot shall be responsible to arrange for bank guarantee or to pay in cash to the Forest Department as a deposit for the Licence to fell timber when the timber in the said area have all been felled the deposit will be refunded by the Government or the guarantee be cancelled when the procedure shall be deemed completed. At present the deposit to be made to the Forest Department is M$75,000.

4. On the signing of this agreement Lo Su Tsoon Timber Depot shall issue a cheque for $50,000 payable to Southern Estate Sdn. Bhd. as a deposit to guarantee that all matters shall be done in accordance with law and in case of any violation of the Rules of Forest Department, fines and damages, Lo Su Tsoon Timber Depot shall be solely liable for the same. On the completion of works when everything is all cleared, the Southern Estate Sdn. Bhd. shall refund this deposit of $50,000.

5. Both parties agree that the existing logs approximately 70,000 cubic feet of Serayah and 40,000 cubic feet of Kapor, royalties for which have been fully paid, lying in the log pond at Weston belonging to Southern Estate Sdn. Bhd. shall be taken over by Lo Su Tsoon Timber Depot at the price of $150,000 and also those existing logs lying inside the camp and by the side of the road approximately 80,000 cubic feet shall also be taken over by Lo Su Tsoon Timber Depot at the price of $70,000, the royalties shall be paid by Lo Su Tsoon Timber Depot on the day when the bill for payment is received.

6. The buildings at the Weston log pond belonging to Southern Estate Sdn. Bhd. and the telephone shall be taken over by Lo Su Tsoon Timber Depot for its use upon payment of a monthly rent of $500 (telephone bills shall be paid separately by Lo Su Tsoon Timber Depot); a deposit representing 6 months' rent in advance shall be paid and thereafter to pay the rent once each month. The buildings in the timber camp, factories and labourers' quarters will be on same condition aforesaid, monthly rent $500 and 6 months' deposit. In case of any damage done to the building constructions, they are liable for repair which shall be returned on completion of the term.

7. The roads in the timber camp constructed by Southern Estate shall be used freely by Lo Su Tsoon Timber Depot but the deposit of $25,000 lent to estate owner by Southern Estate shall be paid by Lo Su Tsoon Timber Depot and shall pay for use of the roads a rent of $500 per year up to the expiration of 6 years to be paid on its behalf to Mr. Bachee, the estate owner. On the expiration of 6 years, the sum of $25,000 shall be refunded by Southern Estate.

8. The parties agree that the five-ton old lorries belonging to Southern Estate, five lorries in number, shall be taken over by Lo Su Tsoon Timber Depot at the price of $7,500 for each lorry. This agreement is made in 2 copies, the original and the duplicate as standard copies. Dated the 12th day of December 1968.

Chopped by Southern Estate Sdn. Bhd. and signed by the Managing Director."

Soon after the execution of the agreement the appellants gave to the respondents four post-dated cheques drawn on the Malayan Banking Limited

1. The 1st cheque due on 20th December, 1968 was for $56,000 of which $50,000 was under clause 4 of the agreement refundable to appellants after the extraction of all the timber in the concession. This cheque was honoured

2. The 2nd cheque for $26,500 due on 27th December, 1968 was in payment for the five lorries valued at $37,500 under clause 8 and payment of the sum of $25,000 for the use of an estate road under clause 7.
3. The 3rd cheque for $150,000 due on 21st January, 1969 was for payment for the logs in the log-pond under clause 5.
4. The 4th cheque for $70,000 due on 12th February. 1969 was to pay for the logs in the camp in the concession under clause 5. The 2nd, 3rd and 4th cheques were not met.

Notice of dishonour was given to the appellants. The appellants then gave the respondents two cheques, one for $5,000 dated 12th January, 1969, and the other for $15,000 dated 20th January, 1969, both of which were honoured.

The respondents sued the appellants for the balance sum due in respect of the three dishonoured cheques. The claim was resisted by the appellants on the ground that they were induced to issue the cheques by fraud on the part of the appellants, and in the alternative that there was failure of consideration. There was a counterclaim for the return of the sum of $83,128.08 made up as follows: —

1. A sum of $20,000 in respect of the two cheques, one for $5,000 and one for $15,000 given to respondents;
2. $7,128.08 price of the spare parts for the lorries;
3. $50,000 deposit paid under clause 3; and
4. $6,000 under clause 6 of the agreement.

The arguments in the court below were directed only to the questions of fraud and consideration. In the event the learned judge gave judgment for the plaintiff and dismissed the counterclaim.

The appellants in their grounds of appeal alleged error on the part of the learned trial judge in holding that there was no fraud and that there was good consideration. They also raised for the first time a point of illegality. They alleged that the agreement was an assignment of the rights of the licensees under the licence in contravention of an express condition in the licence, and therefore illegal.

The point whether the court can take cognizance of a point of illegality, whether pleaded or not, has been the subject of numerous decisions. I need only refer to the case of *Snell* v. *Unity Finance Limited*[1] where most of the authorities were dealt with. In that case Willmer L.J. referred with approval to the propositions set out by Devlin J. in *Edler* v. *Auerbach*[2] who, following the reference to *North-Western Salt Company Limited* v. *Electrolytic Alkali Company Limited*,[3] said:

"That case authorises, I think, four propositions: first, that where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which, taken by themselves show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not."

The instant case comes, if not within the first, at least within the ambit of the fourth proposition.

I will deal with the last ground first as I think it will dispose of the whole appeal. It is clear from the agreement that the appellants were given the right to extract timber in the concession. In return they were responsible for the payment of royalty, taxes, labourers' wages, and all expenses for "management and maintenance including medical expenses and insurance." They were to pay a deposit of $50,000 to cover fines and damages resulting from any violation of the Forest Rules. They could enjoy the use of the buildings, factories, and labourers' quarters and the roads in the camp on payment of rentals.

And finally, there is this important provision in the agreement:

"2. Lo Su Tsoon Timber Depot agrees that as from the date of taking over, in respect of the area of 2,500 acres from which timber has not been felled under this licence, the Beaufort Timber Co-operative Society shall be paid $175 for each acre and also the Jesselton Development Company Sdn. Bhd. shall be paid $75 (per acre). Each year Lo Su Tsoon Timber Depot shall be responsible to pay on behalf of Southern Estate Sdn. Bhd. all such sums payable, namely to pay M$625,000 to the abovenamed persons until full payment."

To implement the agreement the respondents in exercise of the powers contained in the first and second deeds gave the appellants a power of attorney dated 23rd December 1968 (Exhibit A.1(4)) whereby the appellants were given authority.—

"(1) To extract timber in the whole of the area covered by the Special Licence granted by the Forest Department, Sabah to the Beaufort Timber Extraction Co-operative Society Limited, Beaufort.

(2) To process, sell and export such timber as extracted from the said concession.

(3) To sign on our behalf all documents pertaining to the processing, production, sale and export of the timber produced from the land covered by the special licence.

(4) To accept sub-contractor or sub-contractors for the extraction of timber within the said land from any person or persons upon such terms as our said authorised agent may think fit and for that purpose to sign all necessary writings and other instruments relating thereto and to surrender same for cancellation, if advisable.

(5) To effect to us in time all the scheduled payments stipulated in our agreement, dated 12th December, 1968.

(6) To adhere from time to time to the terms and conditions contained in our agreement, dated 12th December, 1968."

The last two clauses link it with the agreement.

The trial judge held that the licensees had given a power of attorney (the first deed) to the Jesselton Development Limited. The latter appointed the Southern Estates Sdn. Bhd, the respondents, as substitute under the second deed. The respondents in this capacity carried out timber extraction in the concession.

The learned trial judge also held that the agreement was for "the take-over of the whole camp, *i.e*

lock, stock and barrel." There is no appeal or argument against this finding of the learned trial judge.

It is therefore clear from the agreement and the power of attorney that the respondents had assigned all their rights in the licence to the appellants and in so doing had parted with the whole of their interest in the licence. In other words, they had in effect transferred their rights in the licence to the appellants.

The licence A.1(1) in Form 1 is subject to a condition that it is not transferable. Rule 4(1) itself of the Forest Rules 1954 provides that a licence such as Form 1 is not to be transferred. As the form did not contain this prohibition the conservator had inserted in the licence the condition against transfer pursuant to the said rule. There is nothing in the Forest Ordinance 26/1954 or in the Rules thereunder authorising the conservator to approve of any transfer. The Forest Ordinance, 1954 was repealed by the Forest Enactment 1968 which came into force on 1st January, 1969.

The respondents commenced their action on 14th July, 1969. The law applicable is therefore the Forest Enactment 1968. The Privy Council case of *Allah Rakhi & Ors.* v. *Shah Mohamed*[4] laid down as a general principle that the law must be considered as at the date when the writ was issued.

The relevant provisions of the Forest Enactment 1968 are as follows: —

*Section 23:*

"Unless expressly authorised by or under the provisions of this Enactment, any person who —

(a) cuts, collects, converts, fells, girdles, marks, lops, removes or taps or injures by fire or otherwise, any forest produce on any State land other than a Forest Reserve; or

(b) removes any forest produce found on any alienated land beyond the boundaries of that land,

shall be guilty of an offence."

*Section 24(1):*

"Subject to the provisions of this Enactment, the Conservator or any person authorized by him in that behalf may issue licences for the doing of all or any of the acts prohibited by sections 20 and 23 of this Enactment upon such conditions and subject to the payment of such fees or royalties (if any) as may be prescribed or as may be specified in such licence."

*And section 24(6):*

"A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law."

The words "personal to the holder and shall not be transferable in any manner whatsoever" are wide enough to include any form of assignment however disguised.

The purposes of this Enactment are. to use the words of Lord Hodson in the case of *Chai Sau Yin* v. *Liew Kwee Sam*: [5]

"wider than those which have been called mere revenue enactments and are intended to insure the carrying on of an industry on which the prosperity of the country is to some extent dependent."

The agreement is, therefore, clearly in breach of the provisions of sections 23(a), 24(1) and (6) of the Enactment, and is illegal, and any claim based thereon will not be enforced.

The following cases are in point. They concern the assignment of rights under a licence to extract timber in contravention of the relevant rules.

In *Tan Bing Hock* v. *Abu Samah*,[6] the defendant was the holder of a licence to extract timber from a forest area in Chegah Perak in Pahang. The licence was issued under rules 2 and 18 of the Forest Rules, 1935, which provide that no licence issued thereunder shall be transferable by power of attorney, by subletting or other means and no sub-contracts or partnerships may be made in connection with the licence in question without prior approval in writing from the District Forest Officer.

The defendant entered into an agreement with the plaintiff whereby the plaintiff was to work and extract timber in the whole of the area; the plaintiff agreed to pay the deposit and all other dues which were required by Government; the plaintiff agreed to construct roads and provide transport and to pay labourers' salaries and their workmen's compensation contributions. The defendant was to make arrangements with Government concerning the area, and the plaintiff agreed to compensate him for all expenses incurred thereby. Another clause in the agreement provided for the payment of $2,000 as a lump sum or total payment in consideration for the logs extracted and sold by the plaintiff. Lastly, the plaintiff was to have the right to arrange for the sale of timber logs extracted from the area.

It was held that the terms of the agreement constituted a complete assignment of the rights in the licence to the plaintiff which was illegal being in contravention of the Forest Rules, 1935. The plaintiff's claim for a declaration that the defendant was liable to perform the covenants in the agreement was dismissed.

In a later case[7] between the same parties in respect of the same agreement the plaintiff claimed damages for breach of the contract to allow him to fell, transport and sell timber from the said area in consideration of the payment of a sum of $2,000. Gill J. dismissed the claim holding that the agreement was an assignment of the plaintiff's rights under the licence in breach of the rules and therefore illegal.

In *Leong Poh Chin* v. *Chin Thin Sin*,[8] the appellant was the holder of a permit to fell timber in the Piah Forest Reserve, Perak. In consideration of a loan by the respondent, he entered into an agreement purporting to assign all his rights and liabilities under the forest permit to the latter's wife. There was evidence that the wife did actually operate in purported exercise of rights assigned to her by the appellant.

It was held that under sections 20 and 22 of the Forest Enactment, a person cannot lawfully exercise rights in a reserved forest by virtue of permission given to someone else. Respondent's wife's exercise of the rights purported to have been assigned to her by the appellant contravened the provisions of the Enactment and was an illegality.

In the instant case it was contended for the respondents that they were the agents by virtue of the first and second deeds of the licensees. Under the two deeds the respondents were given, among other things, full authority to:

"... extract timber from the area, to process, sell and export, to sign on behalf of the respondents all documents pertaining to processing, production and sale of the timber, to state, settle, adjust, compound and compromise all accounts, claims demands between the respondents and other persons and for that purpose to sign, seal and execute any agreement of reference and any instruments necessary. To accept subcontractors for the extraction of the timber and for that purpose to sign all necessary writings and other instruments, to substitute and appoint one or more attorneys with same or more limited powers and at pleasure to remove or appoint and generally to do all acts and things and sign and execute all documents as necessary for effectuating any of the purposes aforesaid as fully and completely as they (the respondents) could do if personally present."

Finally, it was also provided in each of the two deeds that it is not revocable from the date of the power of attorney until the date when the timber in the land under the special licence shall have been exhausted

As agents of the licensees they had appointed the appellants as agents in respect of the several matters set out in A.1(4). There could therefore be no transfer of the licence. The payment of $175 an acre to the licensees and $75 an acre to the Jesselton Development Company was to protect the interest of the said two parties.

It was not suggested by the appellants that there was a "transfer of the licence" under the first and second deeds and A.1(4). What was attacked was the assignment in breach of the Forest Enactment 1968 of the rights under the licence to the appellants by the respondents as agents for the licensees under the agreement. The clause therein providing for the payment of a sum of $175 an acre to the licensees and $75 an acre to the Jesselton Development Company far from assisting the respondents is fatal to their case, as it constitutes one of the promises for the assignment of the rights under the licence to the appellants.

The power of attorney given to the appellants A.1(4) was a colourable device to deceive others, particularly the Forest Department into believing that the appellants were operating as agents for the licensees Mr. Fabia, the Deputy Conservator of Forests, said he was aware that the licensees had appointed the respondents their agents to operate the licence. He knew D.W 2 of the firm (the appellants) only as a person interested in the logs in the pond. He could not say when he saw him. In all probability it was before the execution of A.1(4). But there is not a scrap of evidence that he knew anything about the agreement. Had he done so, it might well have put him on his inquiry in view of section 24(6) of the Forest Enactment.

One other point for consideration is this. Under clause 5 of the agreement the respondents agreed to sell, and the appellants agreed to buy, 110,000 cubic feet of timber in the pond at Weston at a price of $150,000, and 80,000 cubic feet of timber lying in the camp in the concession at a price of $70,000. Is this agreement separable from the whole contract to assign the rights under the licence to the appellants? In my view it is not.

As the learned trial judge said in the instant case:

"This is not merely a contract to buy logs in the log pond and logs in the camp. The buying of these logs is subsidiary to the main contract. The contract was for the takeover of the whole camp, lock stock and barrel."

Another aspect of the transaction is this. Because of the default in the payment of dues, the licence was suspended resulting in the cessation of all operations in the concession. The sale of the timber was made a part of the contract for the reason explained by P.W.1, witness for the respondents (whom the learned trial judge believed), that funds were needed to pay the Forest Department bills. These would be paid out of the purchase money from the sale of the logs. On payment thereof, the suspension of the licence would be lifted. This would be for the benefit of the appellants who could then extract the timber.

In the case of *Kearney* v. *Whitehaven Colliery Company*,(9) Lopes L.J. said: —

"The law is clear that where the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration, and therefore you cannot sever the legal from the illegal part. But where there is no illegality in the consideration and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another..."

In the above case the appellant was employed by the respondents upon the terms that he should be paid according to the weight of the coal obtained by him; that he should not leave his employment without giving fourteen days' notice; that deductions from his wages should be made in respect of dirt sent up to the coal surface.

The appellant left without giving the fourteen days' notice.

The special mode of determining the deductions from his wages, agreed upon between the respondents and the appellant was found to contravene section 12 of the Coal Mines Regulations Act 1887 and was illegal.

It was held that the illegality in that respect did not vitiate the whole contract so as to justify the appellant in leaving without giving fourteen days' notice. As Lopes J. pointed out: —

"Here the consideration moving from the master to the men is the employment and the payment of wages. The consideration moving from the men to the master is the services rendered by them. Both are good and lawful considerations. Then we come to the stipulation with respect to deductions. I am of opinion that that stipulation is altogether separable from and independent of the consideration."

In the instant case, the consideration moving from the respondents is the assignment of the rights under the licence to the appellants, a consideration for the other promises in the agreement. That includes the promise to buy timber in clause 5. The consideration moving from the respondents is illegal and so every

promise in the agreement becomes illegal. Clause 5 is therefore not severable from the illegal consideration.

The appeal is allowed. The claim and counterclaim are dismissed. The appellants will have half the costs of this appeal.

There will be no order as to costs in the court below.

**Azmi L.P.:** I agree that the appeal be allowed for reasons given by the Honourable the Chief Justice of Borneo. The claim and counterclaim are dismissed. The appellants will have half the costs of this appeal.

There will be no order as to costs in the court below.

**Yong J.:** I have had the advantage of reading the judgment of the learned Chief Justice of Borneo and agree to the orders proposed by him for reasons as stated therein. I have nothing to add.

*Appeal allowed*

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## MAZNAH v. ABDUL AZIZ

**[R.C.J. (Harun J.) June 24, 1971]**

**[Kuala Lumpur — Maintenance Case No. 10 of 1954]**

*Family Law — Maintenance — Parties Muslims resident in Selangor — Order made under the Married Women and Children (Maintenance) Ordinance, 1950 — Administration of Muslim Law Enactment (Selangor), 1952.*

The applicant had obtained a maintenance order against her former husband, the respondent, under section 3 of the Married Women and Children (Maintenance) Ordinance, 1950. He subsequently moved to Singapore and the order was registered in Singapore. The respondent then moved to Kuala Lumpur and the applicant applied to the magistrate for the enforcement of the order. The learned magistrate referred the matter to the High Court as to the legality of the maintenance order.

**Held:** as it had been provided by the Selangor Administration of Muslim Law Enactment, 1952 that the Married Women and Children (Maintenance) Ordinance, shall not apply in the case of any claim for maintenance made by a Muslim against a Muslim, the magistrate had no jurisdiction to make the maintenance order in this case and the order must therefore be revoked.

REVISION.

**Harun J.:** The learned magistrate, Kuala Lumpur has referred this case for revision.

The facts are as follows:

On the application of Maznah binti Haji Mohamed Ali (applicant) of Kuala Lumpur against her former husband Abdul Aziz bin Abdullah (respondent) of Kuala Lumpur, the magistrate Kuala Lumpur on 26th February 1954 issued a maintenance order under section 3 of the Married Women and Children (Maintenance) Ordinance 1950 in the sum of $90 per mensem commencing from 2nd day of February, 1954 for the maintenance of their three children and also for the maintenance of the applicant until such time she gives birth to the fourth child. On 30th April, 1954 on the application of the respondent, the magistrate, Kuala Lumpur varied the order by reducing the amount to $70 per mensem commencing from 2nd May, 1954.

The respondent then moved to Singapore and the said maintenance order was registered in the First District Court at Singapore under section 3 of the Reciprocal Enforcement of Maintenance Orders Ordinance. The Singapore courts subsequently varied the order by reducing the amount to $40 per mensen with effect from 2nd August, 1957. The respondent then moved to Kuala Lumpur and the applicant made an application to the magistrate, Kuala Lumpur in May 1971 for —

(a) an attachment of earnings order; and

(b) recovery of arrears of the monthly sums ordered to be paid by the Kuala Lumpur and Singapore courts.

On 22nd May 1971, the learned magistrate, Kuala Lumpur granted her application and issued an order under section 4(1) of the Married Women and Children (Enforcement of Maintenance) Act 1968 on the respondent's employer.

It is as to the legality of this last order that the learned magistrate has referred to this court.

Both the applicant and the respondent are Muslims resident in Kuala Lumpur at the time of the 1954 application for maintenance. Section 13 of the Married Women and Children (Maintenance) Ordinance 1950 gives power to the Selangor State Legislature to exempt cases between persons professing the Muslim religion from the provisions of the Ordinance. The Selangor Legislature exercised this power in section 138 of the Administration of Muslim Law Enactment, 1952 (Selangor) by providing that "the Married Women and Children (Maintenance) Ordinance 1950 shall not apply in the State of Selangor in the case of any claim for maintenance made by a Muslim against a Muslim."

The magistrate, Kuala Lumpur therefore had no jurisdiction to make the order of 26th February, 1954 and consequently all orders made subsequently including that made on 22nd May 1971 are of no effect. This does not mean that the magistrate's court at Kuala Lumpur has no jurisdiction to make attachment of earnings orders in respect of Muslims. Since 19th of July 1968 by the Married Women and Children (Enforcement of Maintenance) (Application to Selangor) Enactment 1968, the Married Women and Children (Enforcement of Maintenance) Act, 1968 now applies in respect of Muslims. But the applicant must first obtain a maintenance order from a Shariah court under the provisions of the Selangor Administration of Muslim Law Ordinance 1952.

For these reasons, I revoke the orders made by the learned magistrate on 26th day of February 1954 and 22nd May, 1971.

*Magistrate's order revoked.*